

CRIMINAL REVISION.

Before Henderson and Biswas JJ.

NITYA NANDA SHARMA

v.

EMPEROR.*

1937

May 27.

Revision—Order of the Sessions Judge under sub-s. (2) of s. 443, Cr. P. C., when final—“Rejects the claim”, Meaning of—Code of Criminal Procedure (Act V of 1898), s. 443.

Section 443, sub-s. (2) of the Code of Criminal Procedure, in providing that the decision of the Sessions Judge shall be final, means that it is not open to the High Court to say that this is a case in which the special procedure of Chap. XXXIII ought to apply when the Sessions Judge has come to the conclusion that it is not, but it does not mean that even though the provisions of the Code have been entirely ignored from start to finish, the High Court will have no power to put the matter right.

The right to make a claim that the case ought to be tried under the provisions of Chap. XXXIII is an absolute right of the accused and cannot be defeated except on the merits, and in order to come to a finding on the merits, the Magistrate is required to follow the procedure laid down in the section which is mandatory. It is left to his discretion to make such enquiry as he thinks necessary, but it is not open to him on any grounds whatsoever to refuse the accused person reasonable time and opportunity to adduce evidence in support of his claim. If he does so, his order is improper and should be set aside. The words “rejects the claim” in sub-s. (2) must mean “rejects the claim on coming to a finding on the merits of the claim “in compliance with the provisions of sub-s. (1) of s. 443”.

CRIMINAL REVISION.

The accused petitioner in this case was the cashier of the Assam Railway and Trading Company, Limited. On August 22, 1935, Mr. W. R. Gawthrop, the Chief Accountant of the said company, filed an information with the Superintendent of Police, Dibrugarh, to the effect that there had been a defalcation of about one and a half lakhs of rupees, for which the accused was responsible. After an elaborate investigation, the police started four cases

*Criminal Revision, No. 316 of 1937, against the order of K.C. Chunder, Sessions Judge of Assam Valley Districts, dated Mar. 20, 1937, affirming the order of A. Bhattacharjya, Magistrate, First Class, of Dibrugarh, dated Feb. 16, 1937.

1937
Nitya Nanda
Sharma
 v.
Emperor.

against the accused, of which three were under s. 408 of the Indian Penal Code and one was under s. 477A. The present case relates to the charge under s. 477A. On February 16, 1937, after some of the prosecution witnesses had been examined, the accused moved an application praying that the trial should be held under the special provisions of Chap. XXXIII of the Code of Criminal Procedure, because the complainant, Mr. Gawthrop, was a European British subject and also because it was expedient for the ends of justice. The accused also prayed for time to enable him to adduce evidence in support of his claim. The trial Court held that the application was not *bona fide* and that it was not necessary to take any evidence on the question. The Court refused to grant an adjournment and dismissed the application.

An appeal was preferred before the Sessions Judge of Gauhati. The learned Judge held that Mr. Gawthrop was not the real complainant in the s. 477A case because he had laid information only of the defalcation. The police must therefore be taken to be complainant in this case. Even if Mr. Gawthrop were the complainant, he must be deemed to be a railway servant in this case, as it related to the affairs of the railway, even though the company itself had business other than the railway in question. The learned Judge, thereupon, dismissed the appeal, against which order the accused moved and obtained this present Rule.

Narendra Kumar Basu, Prabodh Chandra Chatterji and Beereshwar Chatterji for the petitioner.

The Officiating Deputy Legal Remembrancer, Debendra Narayan Bhattacharjya, for the Crown.

HENDERSON J. This is a Rule calling upon the Deputy Commissioner of Lakhimpur to show cause why the petitioner's appeal should not be reheard by the Sessions Judge, or why such other suitable order, as may seem necessary, should not be passed. The

facts are these. The petitioner is undergoing his trial for falsification of accounts before a Deputy Magistrate of Dibrugarh. In the course of the trial, he filed an application under s. 443 of the Code of Criminal Procedure claiming that the special procedure of Chap. XXXIII of that Code should be applied to the case. The Magistrate dismissed the application. He then appealed to the Sessions Judge. In view of the order we propose to make, it will not be necessary to discuss in detail what took place in the Court of the Sessions Judge. Suffice it to say that he dismissed the appeal. The petitioner then obtained this Rule.

On behalf of the Crown, the learned Deputy Legal Remembrancer took a preliminary objection on the ground that we have no power to interfere in view of the provisions of sub-s. (2) of s. 443, which are in these terms :—

Where the Magistrate rejects the claim, the person by whom it was made may appeal to the Sessions Judge, and the decision of the Sessions Judge thereon shall be final and shall not be questioned in any Court in appeal or revision.

In my opinion, that provision is to be interpreted to mean that it is not open to us to say that this is a case in which the special procedure of Chap. XXXIII ought to apply when the Sessions Judge has come to the conclusion that it is not. I am certainly not prepared to give it any wider interpretation than that and to say that, even though the provisions of the Code are entirely ignored from start to finish, this Court will have no power to put the matter right.

When the learned Magistrate dealt with the matter, he certainly purported to deal with it on the merits; but, in view of what he said, we have little doubt that he really dismissed it because he thought that it was a dodge. That, of course, is not really relevant to the question which he had to decide. Under the section, the Magistrate is to hold such enquiry as he considers necessary and to allow the accused a reasonable opportunity to produce such evidence as he thinks necessary in support of his claim.

1937

*Nitya Nanda
Sharma*
v.
Emperor.

Henderson J.

1937

*Nitya Nanda
Sharma*
v.
Emperor.
Henderson J.

In the present case, the Magistrate refused to give him any opportunity to produce evidence at all. That alone is quite sufficient to lead us to hold that the proceedings have not been conducted in accordance with law.

We, therefore, make this Rule absolute and set aside the order of the learned Judge dismissing the appeal and the order of the Magistrate dismissing the application, and we direct the Magistrate to give the petitioner an opportunity to produce evidence and to dispose of the matter in accordance with law.

BISWAS J. I agree. I certainly refuse to hold that sub-s. (2) of s. 443 is intended in any way to bar the High Court's power of revision in a case like this, where the express provisions of the statute are not complied with. The words of sub-s. (2) are that—

Where the Magistrate rejects the claim, the person by whom it was made may appeal to the Sessions Judge, and the decision of the Sessions Judge thereon shall be final and shall not be questioned in any Court in appeal or revision.

This clearly contemplates that the Magistrate should have rejected the claim in accordance with the provisions of sub-s. (1). Sub-section (1) lays down that where, in the course of the trial outside a presidency town of any offence specified therein, the accused persons claims that the case ought to be tried under the provisions of Chap. XXXIII, the Magistrate inquiring into or trying the case, after making such inquiry as he thinks necessary and after allowing the accused person reasonable time within which to adduce evidence in support of his claim, shall come to a finding either that the case is a case which ought to be tried under the provisions of this Chapter, or that it is not such a case. The right to make a claim that the case ought to be tried under the provisions of this Chapter is an absolute right of the accused and cannot be defeated except on the merits, and in order to come to a finding on the merits, the Magistrate is required to follow the procedure laid down in the

section. He may make such inquiry as he thinks necessary : this is left to his discretion, but what is not discretionary is that he shall allow the accused person reasonable time to adduce evidence in support of his claim. This requirement of the section is indeed mandatory, and it is not open to the Magistrate on any grounds whatsoever to refuse this opportunity. In the present case the Magistrate disposed of the matter without giving any time to the accused to adduce evidence, as he thought that the application was a mere pretext for obtaining a further adjournment of the case. In so doing, the Magistrate was plainly transgressing the provisions of the statute, and, in so far as he did so, I think, his order was improper, if not without jurisdiction. Such an order cannot be hit by sub-s. (2). The words "rejects the claim" in sub-s. (2) must, in my opinion, mean "rejects the claim on coming to a "finding on the merits of the claim in compliance with "the provisions of sub-s. (1) of s. 443".

The order passed by the learned Magistrate in this case was, in my opinion, therefore, not a proper order under s. 443, sub-s. (1) and in that view it was the duty of the learned Sessions Judge, if he entertained the appeal, to have set it aside and put the matter right by directing the Magistrate to follow the procedure laid down in that sub-section and give the accused an opportunity to adduce such evidence as he desired to offer in support of his claim. The learned Sessions Judge not having done this, it is our plain duty to make the order ourselves, and we direct accordingly.

Rule absolute.

A.C.R.C.

1937

*Nitya Nanda
Sharma
v.
Emperor.*

Biswas J.